The Planning Inspectorate
National Infrastructure Planning

Date 5 December 2023
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Dear Sir/Madam

Lower Thames Crossing Development Consent Order
REPRESENTATIONS SUBMITTED ON BEHALF OF CS PADFIELD, S&J PADFIELD PARTNERS LLP AND S&J PADFIELD ESTATES LLP
(Planning Inspectorate References: **20035860, 20035861 and 20035864**)

As you are aware, we are instructed to act on behalf of Christopher Scott Padfield, S&J Padfield & Partners LLP and S&J Padfield Estates LLP ("Padfield"), who are the owners of land located to the north and south of the A127 and to the east and west of the M25 at Junction 29, known collectively as the Codham Hall Estate.

We wish to submit further material to meet deadline 8. This consists of post-event written submission of oral comments made at the CAH5 hearings held 20 to 28 November 2023, which we now attach to this letter.

Should there be any queries in connection with the contents of this letter please direct them to Karen Howard whose details can be found above.

Yours faithfully

[redacted]

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Application by National Highways for an Order granting Development Consent for The Lower Thames Crossing

(Planning Inspectorate References: **20035860; 20035861 and 20035864**)

DEADLINE 8

SUBMITTED ON BEHALF OF CS PADFIELD, S&J PADFIELD PARTNERS LLP AND S&J PADFIELD ESTATES LLP

CAH5 FOLLOW-UP WRITTEN REPRESENTATIONS

5 December 2023

Gateley LEGAL

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2. The structure of the Planning Act 2008 ensures that the tests under section 122 of the Act sit above all other tests in the Act by means of the extensive use of the phrase "subject to".

3. This Deadline 8 representation addresses three broads point made orally at the CAH (21st November 2023) and supported by evidence and representations submitted at Deadline 7 (with other points previously referred to remain reiterated as before):

    a) On the proper lawful interpretation of the underlying statutory provisions (sections 120(3)-(5) of the Planning Act 2008, the New Street Works Act 1991 and the Highways Act 1980), and of the provisions of the draft DCO provisions themselves, it remains *ultra vires* for the draft DCO instrument to include the last row of Part 4 of Schedule 4 a reference to the means of access on the South East Quadrant of Junction 29 of the M25 in order to purport to remove the subsisting legal entitlement to use the means of access indicated in that row.

    b) There remains no statutory power underpinning the draft DCO instrument to *override* the provision of Article 1(2)(d) of "The M25 Motorway (A13-A12 Section)(North Ockendon to Nags Head Lane) Compulsory Purchase Order 1979" instrument. The draft DCO, also an instrument, cannot on its own terms or scheme for "means of access" override the entitlement in Article 1(2)(d);

    c) It follows that the NH remains entitled to agree terms, at an appropriate premium, on which to acquire (either temporarily or permanently or both) the land of the Padfields at the South East Quadrant locations for means of access;

    d) Alternatively, and to facilitate the project, the Padfields have formulated a *Grampian* form of Requirement that results to make *intra vires* the cessation of use of the means of access upon the point in time when an actual alternative access has been constructed by NH from the North East Quadrant of Junction 29 and over a new Bridge over the A127 to ensure full and free access for vehicles coming to and from the Padfield land South of the A127 and for tenants and occupiers who have both

not yet been notified of the proposals by NH (at all) and will be landlocked. The drawings for that access provision are already in evidence in Exhibit CSP 13.11 to Mr Padfield's statutory declaration. There is no technical highways objection to that alternative access provision and it could not represent "betterment" because: i) NH is already seeking a DCO to construct a substantially similar access and bridge in the same location; ii) if planning permission is granted, it remains a permission and not a requirement to construct an access.

DEADLINE 8 -

CAH FOLLOW UP REPRESENTATION CODHAM FARM – ACCESS AND REQUIREMENTS

INTRODUCTION

1. This Deadline 8, CAH Follow Up Representation, relates to the proposed compulsory acquisition of land at Codham Hall Farm by National Highways ("NH") for the northernmost parts of the scheme for Lower Thames Crossing ("LTC") under an application for a development consent order ("DCO") requested to be granted by the Secretary of State under the Planning Act 2008. This Representation should be read with the previous representations made.

2. At the CAH5, NH responded to the contentions of the Padfields in essence as follows:

   a) NH asserts that the draft DCO already includes a *stated* provision in Part 3 of the draft DCO *instrument* by which to close the right of means of access of the Padfields to and from the South East Quadrant of Junction 29 of the M25 and that no more is required in the draft DCO by which to take the Padfield's land access right;

   b) NH asserts that the right of access of Mr Padfield *was* (emphasis added) a one off event long since overtaken by the more recent draft DCO. NH asserts that the *right* of means of access does not subsist;

   c) Understandably, (albeit on a misconceived basis) NH is content with its draft DCO as at Deadline 8;

   d) NH makes no comment about the tenants and occupiers of the land of Mr Padfield who take access from the South East Quadrant of Junction 29 of the M25.

3. This Deadline 8 Written Representation reiterates the Summary Representations made in advance and at the CAH and for Deadline 8 also responds to the response by NH during the CAH.

4. The structure of the Planning Act 2008 ensures that the tests under section 122 of the Act sit *above* all other tests in the Act by means of the extensive use of the phrase "subject to".

5. In the context of compulsory acquisition, the provisions of the Planning Act 2008, and those of Orders made and to be made, are required to be construed as follows: "where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights." See the Supreme Court decision in [2011] 1 AC 437 at paragraph 11.

6. This CAH Appendix addresses in **Appendix A** hereto these broad points:

a) The Secretary of State for Transport provides under a 1979 Compulsory Purchase Order the means of accesses from the M25 Junction 29 at three points to Codham Hall Farm. That Order supplies the statutory basis of the "full and free" right of a means of access between the south part of the Farm and the Junction as well as the construction of that access. Whilst the construction of the physical means of access was a one off event, the *right* of means of access *over* the constructed access subsists today. That must be correct because, if it were otherwise as NH asserted at the CAH 5, then on the day *after* the actual construction of the access, Mr Padfield would not be entitled to use the means of access provided by the Order, and as he has done to date (December 2023). It cannot be correct and NH's own evidence shows the contrary position in fact and law;

b) Properly construed in accordance with the requirement of paragraph 11 of [2011] 1 AC 437: i) the 1979 Order created an unfettered subsisting right of means of access from the South East Quadrant of Junction 29 of the M25 and the use of the accommodation bridge was originally limited to s for farm traffic ; ii) the scope of sections 120(3) and (4) (and Part 1 of Schedule 5), and (5) provide different powers for different provisions that may be included in a DCO. Paragraph 17 of Part 1 of Schedule 5 provides for "stopping up or diversion highways". But Mr Padfield's access right is a means of access and is not a "highway". His land *right* under the 1979 CPO Order cannot be *severed* from the highway *without* alteration of that Order underpinning his land right; iii) the sole power to modify an Act is under section 120(5)(a) (or if local, (b)). The draft DCO does not include any reference to the "The M25 Motorway (A13-A12 Section)(North Ockendon to Nags Head Lane) Compulsory Purchase Order 1979"; iv) the asserted closure of the South East Quadrant access to and from Mr Padfield's land remains (as contended by the Padfields in their Written Representations) *ultra vires* the draft DCO; v) it remains difficult to see how the South Bound Fly Lane can be constructed without the private purchase by NH of the means of access from the Padfields;

c) Sections 42 and 44 of the Planning Act 2008 were not complied with by National Highways as required *before* the application was made. Numerous tenants and occupiers observable from the highway and the recent site visit by the ExA and (finally) NH would be significantly affected by a permanent closure and by a premature closure of the Secretary of State's 1979 right of means of access at the South-East point of the Junction 29 roundabout without prior provision of equivalent alternative access;

d) A closure of the South-East of the Secretary of State's right of access without an alternative access would preclude the bringing forward of the Brentwood Enterprise Park that is the employment jewel in the crown of the local planning authority and would employ many people;

e) Access to the south part must be ensured by means of Protective Provisions that embeds the highways proposals for the Brentwood Enterprise Park as between the North-East point of the Junction 29

roundabout and the southern side of the 1979 Bridge (also installed by the Secretary of State for Codham Hall Farm in 1979 to ensure ongoing access to the south of the farm).

Prior Access Requirement

7. The Padfields consider that an appropriately framed *Grampian* form of Requirement could be used to ensure *lawfully* equivalent "full and free" access were actually provided to and from the Junction 29 to and from the Padfields' land for all vehicles and *before* NH commenced its wider construction processes began. The *Grampian* form would ensure the prior supply of the actual constructed access.

8. This *prior* construction would ensure that equivalence was maintained "as far as reasonably possible" (not practicably). The objective evidence base of the "reasonable" element of the "as far as reasonably possible" criteria of paragraph 5.216 of NPS NN is supplied by the drawing reference numbers in Exhibit CSP 13.1.

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5th December 2023

APPENDIX A

ANALYSIS

9. The following is apparent.

A. The Statutory Scheme of the Planning Act 2008 for Compulsory Acquisition and Provisions

10. Section 103(1) of the Planning Act 2008 requires the Secretary of State to decide an application for a development consent order. Section 114 requires the Secretary of State to decide to either make an order granting development consent or refuse development consent. Under section 120 for "provisions" that may be included in a DCO and under section 122 for a provision authorizing the compulsory purchase of land. Section 120(7) makes subsections (3) to (6) "subject to" the following provisions of the Chapter that includes section 122.

11. In respect of the *interpretation* of such statutory provisions (whether in the form of an Act or a statutory instrument such as a DCO or Order), the Supreme Court requires a particular approach to be adopted by the Secretary of State (and recommending ExA) *because* of the compulsory purchase nature of the provisions that result to interfere with vested property rights. Thus, in *Sainsbury's* [2011] 1 AC 498, paragraph 11, the Supreme Court described that approach as "a *presumption, in the interpretation of statutes, against an intention to interfere with vested property rights"* and is required to be given effect by means of a requirement on the Secretary of State (and recommending ExA) to choose the construction of a statutory provision that results in the *least* interference with private rights. Thus, in *Sainsbury's*: (Emphasis added)

> *9. Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: Rugby Joint Water Board v Shaw-Fox [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, "Expropriation, Public Purpose and the Constitution", in The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade, (1998) ed Forsyth & Hare, p 91…*
>
> *10. In Prest v Secretary of State for Wales (1982) 81 LGR 193, 198 Lord Denning MR said:*
>
> > *"I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is demands . . ."*
>
> *And Watkins LJ said, at pp 211—212:*
>
> > *"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."*
>
> *11. Recently, in the High Court of Australia, French CJ said in R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12, paras 40, 42, 43:*

"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."
"42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights . . .
"43. The terminology of 'presumption' is linked to that of 'legislative Intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."

12. This means that, when considering section 120 of the Act, the draft DCO, or the 1979 Order, the Secretary of State is required in law by the *Sainsbury's* case to adopt the *interpretation* and construction of the Act, the draft DCO and the 1979 Order terms that results in least interference with (here) the Padfield's right in the means of access.

13. The interference would result from Draft DCO, page 95, that describes Works No. 9Y and 9Z as the Works desired by NH to be constructed on the land of the Padfields.

14. It remains clear from the responses of NH at the CAH 21st November 2023 that NH was continuing to not applying the law required by the Supreme Court in *Sainsbury's* to be applied.

15. The interference is contended to be given effect by NH as follows. NH exclusively relies on section 120(3) and (4) (and by Part 1 of Schedule 5, paragraph 17 of "The stopping up or diversion of highways"), and on the separate provision of section 120(5)(a), to advance provisions in its Draft DCO under Part 3, Streets, and the application of the 1991 Act under Article 9(1) that, in turn, applies to "carriageways" under the 1991 Act, and Article 12(1) to "temporarily close" a "street or private means of access". Article 13(1) provides for "use [of] any private road within the Order limits". Article 14(1) provides for the permanent stopping up of "each of the streets and private means of access specified in column (1) of Part 1, 2, 3 and 4 of Schedule 4 … to the extent specified and described in column (2) of that Schedule. Article 14(2) is expressly subject to (a) "no new street or private means of access to be constructed or substituted for it, which is specified in column (3) of [Parts 1 and 3 of Schedule 4] has been completed to the reasonable satisfaction of the street authority and is open for use". Article 14(3) provides for a range of conditions to be satisfied but these do not apply if condition (4)(a) (possession) is satisfied.

16. Within Part 4 of Schedule 4, Column (1) provides in draft for: "Other streets or private means of access to be stopped up for which a substitute is not to be provided". The bottom row of that Part provides in Column (1): "Private means of access from south-eastern quadrant of M25 junction 29 roundabout" and Column (2) provides for: "Existing private means of access to be stopped up between points 41/H, 41/K and 41/J as shown on sheet 29 of the rights of way and access plans."

17. Therefore, NH ultimately relies on Article 14(1) to permanently shut the gate on the Padfield's means of access to and from the South East Quadrant of Junction 29 of the M25 to and from their land, and without providing any substitute gate (equivalent right of access) at all.

18. NH also relies on section 120(5)(a) to support the provision in its draft DCO Part 7, Disapplication of legislative provisions, and Articles 53 and 5 thereunder. These Articles expressly modify other statutory provisions (both Acts and Statutory Instruments) that have an existing currency today. For example, Article 53(1)(b) provides for scaffolding (that might be erected) and (6) modifies the CIL Regulations in respect of the meaning of "building". Article 55(1)(a)-(w) expressly list a number of Acts and Orders and expressly excludes or disapplies them.

19. NH further asserted at the CAH on the 21st November 2023 that the right of means of access granted by the Minister for Transport in 1979 was not an "existing" right but was a one off event that has long since been overtaken by, and more recently, the draft DCO in this application.

20. NH further asserted at the CAH on the 21st November 2023 that the provision by it of an alternative access over the Accommodation Bridge over the A127 with equivalent right of access to that off of the South East Quadrant of Junction 29 of the M25 would constitute "betterment".

21. With respect to NH, its assertions and contentions were and remain fundamentally misconceived and amount to rhetorical arm-waving for the following reasons.

22. The origin of the right in issue lies in a Statutory Instrument called "The M25 Motorway (A13-A12 Section)(North Ockendon to Nags Head Lane) Compulsory Purchase Order 1979" ("the 1979 Order") (submitted in evidence before the Secretary of State attached to the Statutory Declaration of Mr Padfield (in Exhibit CSP13.1) submitted at Deadline 7 to the ExA and accepted by it into the Examination). The 1979 Order was made by the Department of Transport, "by the authority of the Minister" on the 24th September 1979.

23. The 'provision' relating of the 1979 Order relating to the 3 accesses from Junction 29 of the M25 to and from to the Padfield Farm are expressly stated in Article 1(1) and 2)(d). Article 1(1) authorises the compulsory purchase of land in Schedule 1. Schedule 1 includes Plot 86 in the District of Brentwood. Plot 86 is shown on a plan marked "The M25 Motorway (A13-A12 Section)(North Ockendon to Nags Head Lane) Compulsory Purchase Order 1979" and entitled "Dwg No 362/L/420/4", signed, and shows land coloured pink. That plan is also attached to the Statutory Declaration of Mr Padfield in Exhibit CSP13.1 immediately behind the 1979 Order and is "the plan" referred to in Article of the 1979 Order. The extent of Plot 86 encompasses the location of the physical means of access from the South East Quadrant of Junction 29 to and from the Padfield land, and also the accessway along the South side of the A127 Eastwards towards the Accommodation Bridge. The pink coloured land also includes the area of the Accommodation Bridge.

24. Article 1(1) powers were expressly "subject to" the subsequent provisions of the 1979 Order that include Article 1(2)(d).

25. Article 1(2)(d) provides more than for the one off event of physical construction of a means of access. This is because, as NH are deemed to know because they are the successor to the Highway Authority that sought the 1979 Order, Article 1(2)(d) provides for:

> *(d) The construction and improvements of highways and the provision of new means of access to premises between North Ockendon and Nags Head Lane in the said London Borough and in the said District in pursuance of the Side Roads Orders.*

26. The Side Roads Orders are defined in Article 6.

27. It will also be recalled that the 1979 Order gives effect to the voluntary agreement by the Minister for Transport with the Padfields by which he promised to provide: a) 3 means of access to their land *from* Junction 29 of the M25; and b) limited means of access over an Accommodation Bridge (to be first constructed for construction earth moving equipment). See Exhibit CSP 13.1, letter from Savills dated 7th June 1976 and recording the agreement of the Minister on page 2, paragraph 4 in respect of the 3 accesses; and see letter dated 31st May 1978 from the Department of Transport, and dated 18th April 1978 from that Department to Essex County Council that refers to a meeting at Codham Hall and the authorisation for a access ("of ample width to allow 2 scrapers to pass"), and access across an accommodation bridge for use by the tenant of Codham Hall subsequently (see letter dated 17th July 1978 from Havering to Department of Transport).

28. Properly interpreted and on its correct construction, the 1979 Order:

    a) Is an "Instrument" within the meaning of section 120(5)(a) and (6) of the Planning Act 2008;

    b) Is not expressly provided for under Articles 53 and 55 of the draft DCO;

    c) Contains under Article 1(2)(d) *two* elements: i) a provision for "construction of a highway"; and ii) a "provision of a new means of access to premises";

    d) The reference to "provision of a new means of access to premises" encompasses two elements (not one): i) the construction of the three means of access to and from the Junction 29 (and along the South Side of the A127 to and including the Accommodation Bridge) and also ii) the *right* to use the three "means of access";

    That interpretation remains consistent with the recorded agreement of the Minister at Exhibit CSP13.1, Savills letter referred to above, page 2, paragraph 4.

29. On no view could – as NH asserted on the 21st November 2023 at the CAH – Article 1(2)(d) provision of a new means of access mean, mean exclusively, or be confined to only the *construction* of a means of access

such that, once it had been actually constructed, it was a one off event that was 'spent' and had no concurrent entitlement to use the means of access. The fallacy of the NH assertion can be tested in two ways: i) if correct, it would follow that the Minister did not provide any right of access to *use* the accesses (plural) from Junction 29 and so the whole of the Padfield access use has bene unlawful from the day of construction of the three means of access; ii) as is actually known to NH, on the 27th July 2004, the antecedent to NH (the Highways Agency) agreed to pay for a *licence for use* of the means of access. See Exhibit 13.1, letters from Strutt and Parker, and Eversheds to the Padfields.

30. It follows, on the evidence of the Minister's agreement beforehand, the 1979 Order provisions, and the evidence after construction, clear that the 1979 Order includes right of means of access that subsists and today exists. Indeed, the TR1 in Exhibit CSP13.1 (dated 30th March 2000) expressly refers under paragraph 3 (as extended) Property, to the locations of the means of accesses (plural), the scope of the *right* ("full and free rights of access") and, at paragraph 1.15 to the 1979 Order itself as part of the paragraph 12 "Further Information". Thereby, the NH assertion - that the 1979 Order was a one off event and is now spent, such that it does <u>not</u> have to be covered by draft DCO Part 7- is plain wrong in law and fact. It does.

31. Further, it will be recalled in *Prest*, that the Court of Appeal, that the taking of land must be "expressly" authorised". Part 7 of the draft DCO does not expressly authorise the taking of the right of means of access. Nor can Part 7 extend to remove the entitlement to retain the physical elements of the means of access. In this respect and further, this is for the following reasons. Section 120 provides for different powers under different subsections. Thus, section 120(3) and (5) concern "provisions" and examples of the content and scope of such provisions is described in Part 1 of Schedule 5 (that include "stopping up" of highways). However, subsection 120(5)(a) and (b) are concerned and relate to a different power: the adaptation or modification of statutory provisions, defined under section 120(60 to mean "a provision of an Act or of an instrument made under an Act". The draft DCO is an instrument made under the Planning Act 2008; the 1979 Order is an instrument made under the Highways Acts 1959 and 1979. On its proper interpretation and construction in itself, but also *additionally* reinforced by Sainsbury's required approach to like effect, the *exclusive* route for adaption or modification of Article 1(2)(d) of the 1979 Order remains under section 120(5)(a). NH disagree because, on their *stated* case to the Secretary of State, NH asserts that all of the terms (in particular, Article 1(2)(d)) the 1979 Order are *outside* of the scope of section 120(5)(a). But Article 1(2)(d) is not. The 1979 Order cannot in law or fact be superseded by an *equivalent* instrument. Thereby, it is legally impossible for the draft DCO, Part 7, to preclude the existing full and free right of passage by the Padfields to and from their land from the three accesses (and the access to and from the Accommodation Bridge over the A127) off of the Junction 29 of the M25.

32. Instead, NH rely on Part 3 of the Draft DCO instrument to – in some way – "stop up" the right guaranteed by the 1979 Order instrument, Article 1(2)(d). That reliance remains fundamentally misplaced and

misconceived for the following reasons. NH are asserting they can achieve by the back door what they have chosen to not do by the front door – relying on proposed provisions in Draft DCO, Part 3, to permanently stop up the entitlement to use of the means of access (of 3) on the South East Quadrant of Junction 29 of the M25. That assertion fails as follows.

33. Firstly, in the absence of express adaption or modification of the 1979 Order instrument terms under section 120(5)(a), the draft DCO instrument remains no more than an *equivalent* instrument and *without* the statutory basis to *override* the terms of the 1979 Order, in particular Article 1(2)(d).

34. Secondly, NH has stated the instruments it modifies under section 120(5) and these are listed in Part 7 and also in Article 9(1) of Part 3, Streets. In Article 9(1), the "1991 Act" is both *applied* and modified in specified ways to the draft DCO via section 120(5). Article 2(1) of the Draft DCO defines the "1991 Act" to mean "the New Roads and Street Works Act 1991". Article 9(1) only applies the 1991 Act to a highway "which consists of or includes a carriageway". Article 2(1) defines "carriageway" to be as defined in the Highways Act 1980. The latter defines "carriageway" to mean under section 329(1): "a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles". The 1991 Act, Part 3, provides for "streets". Section 48(1) defines "street" and it includes "highway" but does not include "means of access". Section 106 of the 1991 Act includes a list of defined expressions but none of these refer to "means of access". Section 105 refers to minor definitions but none of these refer to "means of access".

35. *None* of the draft DCO provisions of Part 3 expressly refer to any *section* of the 1991 Act that identifies "means of accesses" nor to "premises" nor to any underlying power *under an Act* to "stop up" a "means of access" nor such access in relation to a "premises".

36. Instead, NH has drafted its Draft DCO, in particular, draft *instrument* Articles 11, 12, and 14 to create *by means of and under the instrument* itself – and so under section 120(3) and (4) of the Planning Act 2008 - a scheme that asserts an extent over "means of access" and "private means of access".

37. However, sections 120(3) and (4) extend – at most – to the stopping up a "highway" as that expression if used in paragraph 17 of Part 1 of Schedule 5 to the Planning Act 2008. "Highway" is not the same as "means of access". On no view can "highway" encompass "means of access".

38. On its proper interpretation, and additionally affirmed by applying the *Sainsbury's* case also, the legal scope of section 120(4) (interpreted with (5)) and the phrase in (4) "relating to any of the matters listed in Part 1 of Schedule 5" cannot extend *into* matters covered by section 120(5) because that would render subsection (5) otiose. Indeed, section 120(5) operates in the reverse direction by use of the phrase: "which relates to".

39. It follows that the legal scope of Part 3 of the draft DCO instrument cannot extend to override the provisions of Article 1(2)(d) of the 1979 Order granted by the Minister for Transport under the Highways Acts 1959 and 1971.

40. Thereby, the draft DCO *instrument* cannot remove permanently (nor temporarily) the "means of access" to and from each of the *three* Quadrants of Junction 29 of the M25 into Padfield land.

41. It follows that the inclusion of the *description* of the last row of Part 4 of Schedule 4 to the draft DCO, coupled with Article 11, 12(1), and Article 14(1) cannot *override* Article 1(2)(d) of the 1979 Order. The *inclusion* of the said description remains – as ought to be known to NH throughout – *ultra vires*.

42. As was accepted on the evidence of the payment by the NH antecedent Highways England in 2004 for a right to then traverse for construction purposes the means of access location of the Padfields (see Exhibit CSP31.1), if NH today want a licence to use the means of access under Article 1(2)(d) provided by the Minister in 1979 to the Padfields, then NH can offer a licence fee.

43. Similarly, if NH desires to seek to permanently alter the situation of the Ministerial grant of means of access entitlement in favour of the Padfields' land, to enable the construction of a Southbound fly way, then NH can offer an appropriate premium.

44. For over 50 years the Padfields have sought to facilitate highways construction. However, by contrast with the Minister in 1979 who did his best to keep the gate open by creating *three* accesses, granting rights of means of access, *and* ensuring ongoing use of an Accommodation Bridge to maintain connections between the proposed quartering the Padfields' land, the *company* known as NH is today seeking to renege (and ultra vires) by shutting the gates on both the Southern Quadrant access (and associated full and free rights of access) to and from the Junction 29 of the M25 without providing any form of intra vires equivalent. The NH stance is in breach of paragraphs 5.215-216 of the NPS NN and at odds with its own stance in draft DCO Article 14(2) that contains an "unless" provision requiring a "substitution".

45. Theoretically, a Requirement could make (albeit in a different way) the current *ultra vires* inclusion of the last row of Part 4 of Schedule 4 to the draft DCO lawful.

46. NH has failed to *begin* to agree terms of equivalent access and cannot properly under its Corporate Governance Project Control Framework (November 2018) Award a Contract until after the event of a DCO being determined and after a Notice to Proceed. Therefore, an "unless" Requirement can be said to be needed here and justified by the use of the "unless" provision in draft Article 14(2).

47. In line with their reaching an accord for equivalent access with the Minister in 1979 to facilitate then construction of Junction 29, the Padfields would be prepared to propose a *Grampian* form of Requirement.

B. *A Grampian* Requirement

48. The foregoing analysis results to require the deletion of the last row of Part 4 of Schedule 4 to the draft DCO as *ultra vires* the Planning Act 2008. It would be unlawful for NH to continue to include that provision and unlawful for the Secretary of State to include it in a DCO.

49. Without some provision to lawfully address the Minister's 1979 Order, then NH cannot (as it desires) construct the Southbound Fly Way around Junction 29 of the M25. In that instance, construction costs would be helpfully reduced. So too would be reduced or lost various transport benefits relied on by NH in its application for a DCO for the crossing far to the South of the Junction 29 arising from the junction.

50. The Padfields consider that an appropriately framed *Grampian* form of Requirement could be used to ensure *lawfully* equivalent "full and free" access were actually provided to and from the Junction 29 to and from the Padfields' land for all vehicles and *before* NH commenced its wider construction processes began. The *Grampian* form would ensure the prior supply of the actual constructed access.

51. This *prior* construction would ensure that equivalence was maintained "as far as reasonably possible" (not practicably). The objective evidence base of the "reasonable" element of the "as far as reasonably possible" criteria of paragraph 5.216 of NPS NN is supplied by the drawing reference numbers in Exhibit CSP 13.1:

    a) Drawing Reference: X_ZZ – DR CH-000005, Rev C2, "Link Road Between M25 Junction 29 Roundabout and Codham Hall Roundabout Plan and Profile – Sheet 1 of 2", dated January 2022;

    b) Drawing Reference: X_ZZ – DR CH-000006, Rev C03, "Visibility Envelopes", dated January 2022;

    c) Drawing Reference: X_ZZ – DR CH-000007, Rev C03, "Link Road Between M25 Junction 29 Roundabout and Codham Hall Roundabout Plan and Profile – Sheet 2 of 2", dated January 2022;

    d) Drawing Reference: 20-081/440, Rev P4"Onsite Highway Works – Proposed Vertical Alignment Link Road 1", dated January 2022;

    e) Drawing Reference: 20-081/441, "Onsite Highway Works – Proposed Vertical Alignment Link Road 2", dated January 2023;

    f) Drawing Reference: 20-081/504, "Onsite Highway Works – Visibility Splay Sheet 1 of 2", dated January 2023.

52. NH has been consulted on the above access provision and has no technical or other objections (as at 5th December 2023) after its careful consideration of the access link road to the Junction 29. Therefore, there remains no technical highways objection to the accessway shown in the above plans.

53. It is also "reasonable" in the sense of rational, to ensure that a wide number of tenants and occupants observed by the ExA on the Padfield land to the South of the A127 during their site visit of Autumn 2023, but none of whom have been evidenced by NH as having been actually notified *by NH* in the discharge of the obligations on NH under sections 42 and 44 of the Planning Act 2008, could then continue their businesses for a period going forwards with access. By contrast, without that equivalent access, and in light of the ultra vires legal position set out above, *prima facie* there would be a breach of Article 1 of the First Protocol of the Convention and of the Human Rights Act 1998 resulting from a public law unjustified (as in no legal of factual basis) interference with the Convention Rights of those parties.

54. The NH assertion at the CAH on the 21st November 2023 that, if NH provided an alternative access, then the Padfields would experience some kind of "betterment" is fundamentally misplaced and mere arm waving. This is because it presupposes both a grant of planning permission and that a permission would be required to be built out. But as at 5th December 2023, there remains no planning permission. A planning permission is a permission to construct something and is not *requirement* to construct something.

55. By section 104(3), the Secretary of State's decision must accord with the NPS NN unless and to the extent that at least one of subsections (4)-(8) applies. Here, absence a Grampian Requirement as summarised above, section 104(4) would apply (breach of Article 1 of the First Protocol) and so too would (5) because the NPS NN, paragraph 5.126 requires the Secretary of State to go "*as far as* reasonably possible".

56. An alternative remains: that NH will agree a premium for a construction licence and also for permanent cessation of use of the two Southern Quadrants' means of access granted by the Minister for Transport in 1979. If that agreement is reached before the Secretary of State makes his decision under section 104 of the Planning Act 2008, then the Padfields will update him accordingly. Of course, if NH then owns the land and the rights of access by agreement, there would then be no bar to execution of its scheme around Junction 29. The Padfields will keep the Secretary of State updated.

PROPOSED REQUIREMENT FOR PADFIELD ACCESS

Permanent stopping up and extinguishment of means of access

[ ]—

(1) The undertaker shall not close in any way the means of accesses on the South West and South East Quadrants of Junction 29 of the M25 provided for by the M25 Motorway (A13-A12 Section)(North Ockendon to Nags Head Lane) Compulsory Purchase Order 1979 before he has constructed and verified in writing as available and open for use the means of access from Junction 29 to Codham Hall South set out in the following drawings:

a) Drawing Reference: X_ZZ – DR CH-000005, Rev C2, "Link Road Between M25 Junction 29 Roundabout and Codham Hall Roundabout Plan and Profile – Sheet 1 of 2", dated January 2022;

b) Drawing Reference: X_ZZ – DR CH-000006, Rev C03, "Visibility Envelopes", dated January 2022;

c) Drawing Reference: X_ZZ – DR CH-000007, Rev C03, "Link Road Between M25 Junction 29 Roundabout and Codham Hall Roundabout Plan and Profile – Sheet 2 of 2", dated January 2022;

d) Drawing Reference: 20-081/440, Rev P4"Onsite Highway Works – Proposed Vertical Alignment Link Road 1", dated January 2022;

e) Drawing Reference: 20-081/441, "Onsite Highway Works – Proposed Vertical Alignment Link Road 2", dated January 2023;

f) Drawing Reference: 20-081/504, "Onsite Highway Works – Visibility Splay Sheet 1 of 2", dated January 2023;

And has been completed to the reasonable satisfaction of the highway authority until subsequent adoption by the highway authority.

(2) Upon receipt of the said verification by Mr Padfield, Article 2(1)(d) of the the M25 Motorway (A13-A12 Section)(North Ockendon to Nags Head Lane) Compulsory Purchase Order 1979 shall cease to have effect to the extent that it authorises the means of access shown between points 41/H, 41K and 41J as shown on sheet 29 of the rights of way and access plans.

WITNESS STATEMENT OF

CHRISTOPHER SCOTT PADFIELD

ON BEHALF OF CS PADFIELD, S&J PADFIELD PARTNERS LLP AND S&J PADFIELD ESTATES LLP

(Planning Inspectorate References: 20035860; 20035861 and 20035864)

I, **CHRISTOPHER SCOTT PADFIELD** of [redacted] make this witness statement in support of my representations to the proposed Development Consent Order for Lower Thames Crossing (DCO) and to expand on points which were dealt with at the recent Examination hearing CAH5.

I believe these facts to be true to the best of my knowledge and belief.

1. National Highways ("NH") has been actively liaising with me as to its DCO proposals since 2018. We have had several meetings and discussions about the effect of the DCO proposals on my land holdings at Codham Hall including North and South Codham and in conjunction with the Brentwood Enterprise Park planning application.

2. However, NH has never proposed to provide me with an alternative equivalent access either before or after their construction works at Junction 29 of the M25. The Examining Authority ("ExA") will recall from its site visit to my farm in November 2023 that the part situated South of the A127 is occupied by numerous third parties and, as I do, have access to and from the Junction 29 via the means of access granted by the Minister under his "The M25 Motorway (A13-A12 Section)(North Ockendon to Nags Head Lane) Compulsory Purchase Order 1979."

3. Initially Alexander Creed of Strutt and Parker acted for me and was involved in the early discussions with NH. Since 2018 Karen Howard of Gateley Legal has represented me and has also been engaging with National Highways on my behalf. In the last four to five years, I have either attended meetings with or have been provided with records of all engagement with National Highways.

4. I have agreed to NH accessing my land to carry out surveys and have never prevented NH from accessing my land.

5. Evidence has recently been provided by Gateley Legal to the Examination by way of Statutory declaration (both from my mother: Joyce Padfield and me) confirming the history of the provision of the construction of and the right of means of access directly from Junction 29 to the South West and South East to South Codham (and other means of access to my landholdings).

6. It is important to acknowledge that the effects of the DCO are to interfere with all my rights of access to my landholdings which I have had full liberty to use over many years as all are in some way affected by the proposal and inhibit my ability to use my land. Further details of the origin of those accesses were explained in detail at CAH5 on the 21 November 2023 which I attended in person.

7. I have read the witness statement prepared by Karen Howard dated 17th November 2023 and can confirm the facts therein. I do not intend to repeat those facts in this statement as they are a matter of record.

8. Whilst at the CAH5 hearing I heard the Applicant's response given by Andrew Tait KC to Counsel Christiaan Zwart following our explanation that we have a continued requirement for access, and a subsisting entitlement to use the means of access as evidenced by my statutory declaration and the exhibited documents to it that include the Minister's "The M25 Motorway (A13-A12 Section)(North Ockendon to Nags Head Lane) Compulsory Purchase Order 1979", to facilitate the uses at South Codham in the absence of any coming forward of the Brentwood Enterprise Park.

9. Of course, the application for planning permission for the "BEP" is a planning permission and not a requirement and there is no obligation to build it nor build it by a certain time even it were permitted. The NH stance on "betterment" is also deeply confused – because NH *itself* is proposing in outline to *itself* construct an alternative access and bridge over the A127 at some point in the future. So the "betterment" point it announced at the CAH operates in reverse - by saving it from constructing something that it proposes in the DCO to construct. But, whereas there is no requirement to build the BEP, there is a 'preference' advanced by NH that it remodel the Junction 29 (and its access arrangements to and from my land) to improve the transport situation and benefits and to ensure that adverse impacts of its scheme are minimised. I think therefore there is nothing in NH's asserted reason for not building earlier part of its *own* scheme is fundamentally misplaced.

10. I was extremely surprised that Andrew Tait KC as a lawyer asserted – as an apparent fact - that Brentwood Borough Council have taken issue about the intensification of the use of the means of accesses, the implication being that NH are attempting through the DCO process to *resolve* something that the Borough Council has disclosed to it in some way. NH are not resolving any local traffic issue and there remains no evidence I have seen or has been presented by NH that the Council have taken any issue of that kind. I want to make it clear to the Examiners that this is mere assertion and misrepresents the position.

11. This answer was given by a lawyer for NH in open forum. However at *no point* either before or during the DCO process has this suggestion been advanced to me nor made by Brentwood Borough Council to the ExA. NH should retract this asserted comment as it is entirely self-serving to NH's case. It does not represent the factual position as I understand it. NH have always presented the need for closure of what it describes

as my “private means of access” as part of the works necessary to support the LTC crossing works, not because it is seeking to resolve a local planning issue.

12. NH are aware of the facts surrounding the access to my land and have not made *any* attempt to negotiate an alternative means of access with me during the period of DCO negotiations despite this being raised in all our representations. It remains my view that an access should be provided in exchange for the access which I will have to forgo which was provided to the land in exchange for land acquired and required to support the earlier M25 CPO proposals. NH is trying to shut the gates on my access in the face of the Minister doing the opposite in 1979 and seeking to provide as much access as he could then.

13. Recognising the need for access we were also given free rights of access to use a new (Accommodation) Bridge as well as the accesses from the Junction 29 going forwards. Today, that Bridge is deemed not fit for its purpose because of the narrow width and risk of vehicles today coming off the side of the Bridge.

14. Indeed, the Highways’ Agency paid me a premium for a licence in 2004 to use the means of access for their construction vehicles. NH has never come forward and offered to pay for a licence or to purchase permanent rights over my land.

15. I know that NH have been aware of the existence of a number of tenants and occupiers on my land in particular at South Codham since our first engagement and reference to those tenants has been made at several meetings with NH over the last five years. I am surprised that NH has made no attempts to notify the occupiers and tenants of the land despite the obligation under the Planning Act 2008 on them to do so.

16. On 5 June 2023 I requested my office to make a series of telephone calls to various tenants on South Codham to check whether they were aware of the proposals. I can confirm that I have seen a copy of the email from Luci Turner dated the same date which confirmed that the following companies on Codham South verbally confirmed to her that they had <u>not</u> received direct correspondence regarding the Lower Thames Crossing:

    a) Boyle Highways,

    b) Cosco,

    c) CMCCE,

    d) Comex,

    e) Capital UK,

f) Triplex; and

g) Marlborough.

17. I am further advised and understand that, whilst there have been a lot of meetings and liaison with me by NH, none of the tenants and occupiers have been contacted directly by NH to discuss how the proposals to shut the means of access from the south eastern quadrant of the M25 junction will affect the day-to-day operation of their businesses and general access to and from South Codham. It is obvious to a person on the site that shutting the access to and from the Junction 29 and without equivalent means of access being provide beforehand, will fundamentally affect their individual operations by barring their access. NH will have seen numerous third party occupiers on the land South of the A127 in Codham Hall South when NH also attended the site visit to my farm. I am not aware that, since that date, and despite the Hearing not closing until Christmas, NH has taken any steps to contract those third parties and nor have I seen anything of what any of them may say to the ExA or Secretary of State. Who knows what each of them may say if notified of the DCO Proposals and the effect on each of them.

18. I am surprised at the very real absence of any engagement by NH with third parties on the land. I am advised and understand that a CPO, under the Town and Country Planning 1990, in the Nicholson Quarter of Maidenhead, was not confirmed by the Secretary of State for want of engagement by the acquiring authority in a town centre regeneration scheme of wide-ranging importance. I am also advised and understand that the Planning Act 2008 Guidance related to procedures for Compulsory Purchase (September 2013), paragraph 11, provides that “the Secretary of State could reasonably justify granting development consent for a project, but decide against including in an order the provisions authorising the compulsory acquisition of the land.” Given the absence of notification by NH of the tenants and occupiers of the land of South Codham Hall, I consider it would be reasonable to not confirm the CPO part of the draft DCO as it relates to South Codham. No doubt NH could simply hire construction compounds in that location to use for highway construction as others have before them - see my Exhibit CSP 13 and the use by Highways Agency of parts of that land under licence for highways works.